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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

AETNA LIFE INSURANCE COMPANY and
AETNA HEALTH MANAGEMENT,
Petitioners,

v.

STUART CIRCLE HOSPITAL CORPORATION,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

Aetna Life Insurance Company and Aetna Health Management (collectively "Aetna") petitioned for a writ of certiorari on the question whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, preempts a Virginia "any willing provider" law that mandates the health care providers that must be included in a preferred provider organization ("PPO"). In its petition, Aetna demonstrated the extraordinary importance of this question: Any willing provider laws undermine the fundamental logic of the PPO, a market-driven mechanism for the efficient delivery of medical care, and thereby increase significantly the cost of health care for employee benefit plan participants. The several briefs of *amicus curiae* submitted in support of Aetna attest to the vital nature of the question presented. Aetna showed also that the Fourth Circuit's decision in this case, holding that the Virginia law is saved from ERISA preemption as a law that regulates insurance, is directly contrary to Supreme Court authority and inconsistent with the decision of at least one other court of appeals.

Respondent Stuart Circle Hospital Corporation ("Stuart Circle") does not dispute the significance of the question presented, or the profound adverse consequences that any willing provider laws create for benefit plan participants.[1] Rather, Stuart Circle uses

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[1] Stuart Circle does argue that Aetna's demonstration of the exceptional harm caused by the Virginia any willing provider law is "irrelevant" if the law is not preempted. Opp. at 11 n.9. But this is a petition for writ of certiorari, for which the importance of the question presented is very much relevant. S.

its brief in opposition principally to restate the Fourth Circuit's conclusions. Aetna has demonstrated already how the Fourth Circuit misapplied this Court's case law. Stuart Circle's brief adds little new.

Like the Fourth Circuit, Stuart Circle asserts that the issue in this case is controlled by *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). Like the Fourth Circuit, Stuart Circle ignores the import of *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). *Metropolitan Life* simply does not speak to the issue in this case, while *Royal Drug* addresses it squarely.

Metropolitan Life concerned a state statute that regulated the content of health insurance policies directly, mandating that these policies provide coverage for the treatment of certain illnesses and injuries. That "mandatory benefit" law was, in the Court's view, a law regulating the "business of insurance." 471 U.S. at 743. *Royal Drug*, by contrast, like the present case, involved the contractual relationship between an insurance company and service providers. That contractual relationship affected policy holders only indirectly by dictating *who* would provide covered services; the service arrangements had no effect on the services covered by the insurance policy. This Court held that such service arrangements are not the "business of insurance."[2] 440 U.S. at 216-17. It

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Ct. Rule 10.1(c). Stuart Circle does not dispute the importance of the question here. Moreover, that any willing provider laws are harmful to plan participants, and subject plan sponsors to inconsistent regulation, obviously is relevant to the question whether this is the type of law ERISA is intended to preempt.

[2] The Third Circuit's decision in *Ticor Title Ins. Co. v. FTC*,

follows *a fortiori* that if that practice does not constitute the "business of insurance," a statute mandating who must provide covered services (a "mandatory provider" law) is not a law regulating insurance.

Royal Drug is still good law, as much as Stuart Circle would like to ignore that decision. *See United States Dept. of Treasury v. Fabe*, 113 S. Ct. 2202, 2209 (1993) (*Royal Drug* involved "ancillary activities" with insufficient connection to the obligations of the insurance contract); *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2902 (1993) ("agreements that insurance companies ma[k]e with parties wholly outside the insurance industry, . . . such as the retail pharmacists involved in *Royal Drug* . . . are unlikely to be about anything that could be called 'the business of insurance,' as distinct from the broader 'business of insurance companies' ") (internal quotations and citations omitted). Nothing in *Metropolitan Life* is inconsistent with *Royal Drug* or dictated the result reached by the Fourth Circuit. *Metropolitan Life* con-

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998 F.2d 1129 (3d Cir. 1993), stands also for the proposition that insurance company service arrangements are not the "business of insurance." In that regard, *Ticor* is consistent with *Royal Drug* and inconsistent with the Fourth Circuit opinion here. Stuart Circle contends that *Ticor* is inapposite because this case, unlike *Ticor*, involves a statute that "regulates the contents of an insurance contract." Opp. at 8. But the Virginia law does not regulate insurance contracts, it regulates service arrangements between insurance companies and service providers. These arrangements affect the terms of insurance contracts, but so too do the title search and examination services at issue in *Ticor*. The real distinction between this case and *Ticor* is that the Third Circuit followed the rule of *Royal Drug*, while the Fourth Circuit did not.

cerned a mandatory *benefit* law; Virginia Code § 38.2-3407 is a mandatory *provider* law.[3] Mandatory provider laws were not at issue in *Metropolitan Life*.

Stuart Circle seeks to avoid this fact by making a holding out of prefatory language in *Metropolitan Life*. By way of introduction to the problem presented in *Metropolitan Life*, the Court explained that mandatory benefit laws are one species of a larger family

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[3] It is unclear whether Stuart Circle understands how Virginia Code § 38.2-3407 works. Stuart Circle contends that the statute would not affect insurance companies that simply administer self-funded employee benefit plans. Opp. at 3 n.2. The statute plainly applies to insurance companies that "administer" a PPO, Va. Code § 38.2-3407(A), regardless of whether the employee benefit plan itself might be considered an insurer.

Stuart Circle also seeks to soften the blow of the Virginia statute by arguing that a PPO network with reasonable terms and conditions *may* exclude providers willing to meet those terms. Opp. at 4 n.4. The plain language of Virginia Code § 38.2-3407 is to the contrary. *HCA Health Services of Va., Inc. v. Metropolitan Life Ins. Co.*, 752 F.Supp. 202 (E.D. Va. 1990), *appeal dismissed*, 957 F.2d 120 (4th Cir. 1992), which Stuart Circle cites, is consistent with this plain language.

Stuart Circle accuses Aetna of failing to reproduce in its petition sections of Virginia Code § 38.2-3407 relevant to this case. Opp. at 2. The only section not reproduced in Aetna's petition to which Stuart Circle makes reference is section 38.2-3407(E). *Id.* Stuart Circle fails to explain the import of this provision to the present case. Section (E) merely explains that an insurance policy offering health coverage through a PPO is a policy that specifies the amount of insurance coverage for treatment by preferred and nonpreferred providers. It is a non-controversial definitional section without relevance to the issue presented here. Stuart Circle might as well have accused Aetna of failing to reproduce all of ERISA's definitional provisions. The rules of this Court require reproduction only of those statutory provisions "involved in the case." S. Ct. Rule 14.1(f).

of state regulation. 471 U.S. at 729. These laws include mandatory provider provisions. *Id.* From this passing reference, Stuart Circle concludes that *Metropolitan Life* resolves the issue in this case. Opp. at 7, 13, 15.

To read *Metropolitan Life* as resolving an issue clearly not before the Court is contrary to established principles of jurisprudence.[4] It also would expand *Metropolitan Life* to overrule *Royal Drug sub silentio*, or to confine the applicability of *Royal Drug* to non-ERISA cases. These conclusions are plainly contradicted by the reaffirmation of *Royal Drug* in *Fabe* and *Hartford Fire* and, more importantly, by *Metropolitan Life* itself, an ERISA case that cites *Royal Drug* for the definition of the "business of insurance." 471 U.S. at 743. *Metropolitan Life* and *Royal Drug* are completely compatible. The two cases present a rational distinction between mandatory benefit and mandatory provider laws. The former regulate the business of insurance; the latter do not.

Stuart Circle's recapitulation of the Fourth Circuit's argument extends to its attempt to distinguish *Royal Drug*. Stuart Circle repeats the Fourth Circuit's mistake that the choice of provider is a "benefit" and part of the insured risk—unlike the choice of pharmacists in *Royal Drug*—and therefore falls within the ambit of *Metropolitan Life*. Opp. at 16-17. This is no distinction at all. Stuart Circle merely mimics the

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[4] *See Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821) ("The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.").

Fourth Circuit's conclusion that choice of physician or hospital is an "important" component of health insurance.[5] Choice of physician may be important to benefit plan participants, but this does not answer the question whether a limitation on choice of providers constitutes the "business of insurance." On this point, *Royal Drug* is unequivocal: a restriction on the providers of services without a concomitant restriction on services provided is not the "business of insurance."

At base, the Fourth Circuit's, and consequently Stuart Circle's, conclusion rests on nothing more than an intuitive feeling that choice of doctors and hospitals is different from choice of pharmacists and therefore more appropriately the subject of state regulation. There are obvious differences between these choices, and a state legislature understandably might be more concerned with one than the other, but ERISA preempts all such regulation unless it regulates the "business of insurance." Neither the Fourth Circuit nor Stuart Circle points to any distinction between a contractual arrangement limiting the choice of pharmacists and an identical arrangement limiting the choice of doctors and hospitals that is relevant to the question whether a limitation of either choice is the "business of insurance." The "business of insurance" question certainly does not turn on whether one practice is more "important" than another in the view of a state legislature.

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[5] Stuart Circle contends also that the limitation of providers available in a PPO affects the "quality" of care available to insureds. Opp. at 4. There is absolutely nothing in the record in this case to support this assertion.

To supplement its fruitless distinction of *Royal Drug*, Stuart Circle argues that this Court's recent decision in *Fabe* has rendered *Royal Drug* irrelevant to ERISA. Opp. at 17-19. In fact, *Fabe* fully supports the conclusion that laws that regulate insurance company service arrangements do not regulate the "business of insurance." *Fabe* involved a state law that regulated directly the performance of insurance contracts (i.e., the payment of benefits to insureds) in bankruptcy, and therefore regulated the "business of insurance." The Court distinguished *Royal Drug*, which involved only insurance company "ancillary activities." 113 S. Ct. at 2209. Any "indirect effects" on insurance policies from the service arrangements at issue in *Royal Drug*, the *Fabe* Court explained, are insufficient to make the practice the "business of insurance." *Id.* at 2212. The same necessarily is true of the PPO arrangements at issue here.

Stuart Circle purports to find support for its position from the distinction drawn in *Fabe* between the first and second clauses of section 2(b) of the McCarran-Ferguson Act. The first clause addresses state laws enacted "for the purpose of regulating the business of insurance," while the second clause exempts from federal antitrust regulation the "business of insurance." 15 U.S.C. § 1012(b). The *Fabe* Court explained that the scope of the first clause necessarily is broader than that of the second. 113 S. Ct. at 2210. Stuart Circle contends that the ERISA insurance savings clause is the equivalent of the first clause of the McCarran-Ferguson Act and, therefore, that *Royal Drug*, which dealt with the second clause, is irrelevant.

Stuart Circle reads far too much into *Fabe* and ignores the logic of that opinion. While distinguishing between laws enacted "for the purpose of regulating the business of insurance," and the "business of insurance," the Court did not ignore—as it could not—that the phrase "business of insurance" appears in both clauses. If a practice does not constitute the "business of insurance" under the second clause of the McCarran-Ferguson Act, then a law directed solely at that practice cannot possibly be law that has "the purpose of regulating the business of insurance" under the first clause. *Royal Drug*, which the Court reaffirmed in *Fabe*, teaches that the insurance company service arrangements at which Virginia Code § 38.2-3407 is directed are not the "business of insurance."

In addition, Stuart Circle's attempted identity between the first clause of McCarran-Ferguson—which protects state laws enacted "*for the purpose of* regulating the business of insurance," 15 U.S.C. § 1012(b) (emphasis added)—and the ERISA insurance savings clause—which saves from ERISA preemption laws "which regulate[] insurance," 29 U.S.C. § 1144(b)(2)(A)—simply does not work. The Court in *Fabe* based its distinction between the first and second clauses of the McCarran-Ferguson Act on the "purpose of" language. *See* 113 S. Ct. at 2210 (laws enacted "for the purpose of " regulating the business of insurance possess the "end, intention, or aim" of regulating the business of insurance and therefore encompass more than just the "business of insurance") (internal quotations and citation omitted). That language is missing from the ERISA insurance savings clause, which excepts from ERISA preemption

only laws that actually *do* "regulate the business of insurance."

That *Royal Drug* and the second clause of the McCarran-Ferguson Act (which addresses the "business of insurance") retain their relevance to the ERISA insurance savings clause is absolutely certain from both *Fabe* and *Metropolitan Life*, upon which Stuart Circle builds its entire argument. The *Fabe* Court explained that *Royal Drug* and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), involved the second clause of the McCarran-Ferguson Act. 113 S. Ct. at 2209. In *Metropolitan Life*, the Court adopted explicitly to its application of the ERISA insurance savings clause the three-part test developed in *Pireno*, and the Court cited *Royal Drug* in the same passage. 471 U.S. at 743. The *Royal Drug/Pireno* analysis thus controls in ERISA preemption cases.

Stuart Circle ends its brief with a repetition of the Fourth Circuit's observation that the policy behind the Virginia any willing provider law is "a concern of the legislature, not the judiciary." Opp. at 19, 20. This is nothing but question begging. If ERISA preempts Virginia Code § 38.2-3407, then the choice to mandate PPO providers is certainly *not* left to the Virginia legislature. The question presented here is whether the Virginia statute is the type of law ERISA preempts. The policy this Court would enforce in answering this question is the basic policy behind ERISA preemption, precluding what Congress judged to be the deleterious effects of state interference with employee benefit plans.[6]

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[6] Stuart Circle also raises the specter of health care reform.

CONCLUSION

For the foregoing reasons and those set forth in Aetna's petition for writ of certiorari, the Court should grant this petition and set the case for plenary review.

November 4, 1993 Respectfully submitted,

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Opp. at 20 n.16. That long-term process should present no obstacle to review of the question presented by this petition. It is impossible to predict what, and when, health care reform will come, or how it might affect any willing provider laws. These laws are in place *now* inhibiting immediate solutions to rising health care costs. Indeed, virtually every health care reform proposal is based on some form of managed care, underscoring the importance of the mechanisms with which state laws now interfere. *See also* Brief *Amicus Curiae* of the Travelers Insurance Company and Blue Cross and Blue Shield of the National Capital Area at 18-20.